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Subpart E—Hearing and Decision

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AUTHORITY: Secs. 8, 18, Occupational Safety and Health Act of 1970 (29 U.S.C. 657, 667); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (48 FR 35736), as applicable.

SOURCE: 40 FR 23467, May 30, 1975, unless otherwise noted.

Subpart A—General

§ 1955.1 Purpose and scope.

(a) This part contains rules of practice and procedure for formal administrative proceedings on the withdrawal of initial or final approval of State plans in accordance with section 18(f) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667).

(b) These rules shall be construed to secure a prompt and just conclusion of the proceedings subject thereto.

§ 1955.2 Definitions.

(a) As used in this part unless the context clearly requires otherwise:

(1) *Act* means the Occupational Safety and Health Act of 1970;

(2) *Assistant Secretary* means Assistant Secretary of Labor for Occupational Safety and Health;

(3) *Commencement of a case* under section 18(f) of the Act means, for the purpose of determining State jurisdiction following a final decision withdrawing approval of a plan, the issuance of a citation.

(4) *Developmental step* includes, but is not limited to, those items listed in the published developmental schedule, or any revisions thereto, for each plan contained in 29 CFR part 1952. A developmental step also includes those items in the plan as approved under section 18(c) of the Act, as well as those items in the approval decision which are subject to evaluations (see e.g., approval of Michigan plan), which

were deemed necessary to make the State program at least as effective as the Federal program within the 3 year developmental period. (See 29 CFR 1953.10(a)).

(5) *Final approval* means approval of the State plan, or any modification thereof under section 18(e) of the Act and subpart D of 29 CFR part 1902.

(6) *Initial approval* means approval of a State plan, or any modification thereof under section 18(c) of the Act and subpart C of 29 CFR part 1902;

(7) *Party* includes the State agency or agencies designated to administer and enforce the State plan that is the subject of withdrawal proceedings, the Department of Labor, Occupational Safety and Health Administration (hereinafter called OSHA), represented by the Office of the Solicitor and any person participating in the proceedings pursuant to § 1955.17;

(8) *Person* means an individual, partnership, association, corporation, business trust, legal representative, an organized group of individuals, or an agency, authority, or instrumentality of the United States or of a State;

(9) *Secretary* means Secretary of Labor;

(10) *Separable portion of a plan* for purposes of withdrawal of approval generally means an issue as defined in 29 CFR 1902.2(c), i.e. "an industrial, occupational or hazard grouping which is at least as comprehensive as a corresponding grouping contained in (i) one or more sections in subpart B or R of part 1910 of this chapter, or (ii) one or more of the remaining subparts of part 1910": *Provided*, That wherever the Assistant Secretary has determined that other industrial, occupational or hazard groupings are administratively practicable, such groupings shall be considered separable portions of a plan.

(b) [Reserved]

§ 1955.3 General policy.

(a) The following circumstances shall be cause for initiation of proceedings under this part for withdrawal of approval of a State plan, or any portion thereof.

(1) Whenever the Assistant Secretary determines that under § 1902.2(b) of this chapter a State has not substantially completed the developmental steps of

its plan at the end of three years from the date of commencement of operations as defined in §1953.10(b) of this chapter, a withdrawal proceeding shall be instituted. Examples of a lack of substantial completion of developmental steps include but are not limited to the following:

- (i) A failure to develop the necessary regulations and administrative guidelines for an “at least as effective” enforcement program;
- (ii) Failure to promulgate all or a majority of the occupational safety and health standards in an issue covered by the plan; or
- (iii) Failure to enact the required enabling legislation.

(2) Whenever the Assistant Secretary determines that there is no longer a reasonable expectation that a State plan will meet the criteria of §1902.3 of this chapter involving the completion of developmental steps within the three year period immediately following commencement of operations as defined in §1953.10(b) of this chapter, a withdrawal proceeding shall be instituted. Examples of a lack of reasonable expectation include but are not limited to the following:

- (i) A failure to enact enabling legislation in the first two years following commencement of operations where the remaining developmental steps are dependent on the passage of enabling legislation and cannot be completed within one year; or
- (ii) Repeal or substantial amendment of the enabling legislation by the State legislature so that the State program fails to meet the criteria in §1902.3 of this chapter; or
- (iii) Inability to complete the developmental steps within the indicated three year period.

(3) Whenever the Assistant Secretary determines that in the operation or administration of a State plan, or as a result of any modifications to a plan, there is a failure to comply substantially with any provision of the plan, including assurances contained in the plan, a withdrawal proceeding shall be instituted in a State which has received final approval under section 18(e) of the Act, and may be instituted in a State which has received initial approval under section 18(c) of the Act.

Examples of a lack of substantial compliance include but are not limited to the following:

- (i) Where a State over a period of time consistently fails to provide effective enforcement of standards;
- (ii) Where the rights of employees are circumscribed in such a manner as to diminish the effectiveness of the program;
- (iii) Where a State, without good cause, fails to continue to maintain its program in accordance with the appropriate changes in the Federal program;
- (iv) Where a State fails to comply with the required assurances on a sufficient number of qualified personnel and/or adequate resources for administration and enforcement of the program; or
- (v) Where, on the basis of actual operations, the Assistant Secretary determines that the criteria in section 18(c) of the Act are not being met, that the period of concurrent authority under section 18(e) of the Act should not be extended, and that final approval under section 18(e) of the Act should not be given.

(b) A State may, at any time both before or after a determination under section 18(e) of the Act, voluntarily withdraw its plan, or any portion thereof, by notifying the Assistant Secretary in writing setting forth the reasons for such withdrawal. Such notification shall be accompanied by a letter terminating the application for related grants authorized under section 23(g) of the Act in accordance with 29 CFR 1951.25(d). Upon receipt of the State notice the Assistant Secretary shall cause to be published in the FEDERAL REGISTER a notice of withdrawal of approval of the State plan or portion thereof (see Montana notice 39 FR 2361, June 27, 1974).

(c) Approval of a portion of a plan may be withdrawn under any of the paragraphs in this section when it is determined that that portion is reasonably separable from the remainder of the plan in a manner consistent with the provisions in §1902.2(c) of this chapter defining the scope of a State plan. As an example, such a partial withdrawal of approval would be considered appropriate where a State fails to

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adopt, without good cause shown, Federal standards within a separable issue, such as occupational health.

§ 1955.4 Effect of withdrawal of approval.

(a) After receipt of notice of withdrawal of approval of a State plan, such plan, or any part thereof, shall cease to be in effect and the provisions of the Federal Act shall apply within that State. But the State, in accordance with section 18(f) of the Act, may retain jurisdiction in any case commenced before receipt of the notice of withdrawal of approval of the plan, in order to enforce standards under the plan, whenever the issues involved in the case or cases pending do not relate to the reasons for withdrawal of the plan.

(b) Such notice of withdrawal of approval shall operate constructively as notice of termination of all related grants authorized under section 23(g) of the Act in accordance with 29 CFR 1951.25(c).

§ 1955.5 Petitions for withdrawal of approval.

(a) At any time following the initial approval of a State plan under section 18(c) of the Act, any interested person may petition the Assistant Secretary in writing to initiate proceedings for withdrawal of approval of the plan under section 18(f) of the Act and this part. The petition shall contain a statement of the grounds for initiating a withdrawal proceeding, including facts to support the petition.

(b)(1) The Assistant Secretary may request the petitioner for additional facts and may take such other actions as are considered appropriate such as:

(i) Publishing the petition for public comment;

(ii) Holding informal discussion on the issues raised by the petition with the State and other persons affected; or

(iii) Holding an informal hearing in accordance with § 1902.13 of this chapter.

(2) Any such petition shall be considered and acted upon within a reasonable time. Prompt notice shall be given of the denial in whole or in part of any petition and the notice shall be accompanied by a brief statement of the

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grounds for the denial. A denial of a petition does not preclude future action on those issues or any other issues raised regarding a State plan.

Subpart B—Notice of Formal Proceeding

§ 1955.10 Publication of notice of formal proceeding.

(a) The Assistant Secretary, prior to any notice of a formal proceeding under this subpart, shall by letter, provide the State with an opportunity to show cause within 45 days why a proceeding should not be instituted for withdrawal of approval of a plan or any portion thereof. When a State fails to show cause why a formal proceeding for withdrawal of approval should not be instituted, the State shall be deemed to have waived its right to a formal proceeding under paragraph (b) of this section and the Assistant Secretary shall cause to be published in the FEDERAL REGISTER a notice of withdrawal of approval of the State plan.

(b)(1) Whenever the Assistant Secretary, on the basis of a petition under § 1955.5 or on his own initiative, determines that approval of a State plan or any portion thereof should be withdrawn, and the State has not waived its right under § 1955.3(b) or paragraph (a) of this section to a formal proceeding, he shall publish a notice of proposed withdrawal in the FEDERAL REGISTER as set out in § 1955.11 and cause such notice, in the form of a complaint, to be served on the State in accordance with § 1955.15.

(2) Not later than 5 days following the publication of the notice in the FEDERAL REGISTER, the State agency shall publish, or cause to be published, within the State reasonable notice containing a summary of the information in the Federal notice, as well as the location or locations where a copy of the full notice is available for inspection and public copying.

(3) Two copies of such notice shall be served on the Assistant Secretary in accordance with § 1955.15.

(c) Not less than 30 days following publication of the notice in the FEDERAL REGISTER, the State shall submit